

Dec 09, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES CARL METCALF,

Plaintiff,

v.

JAMES KEY, Superintendent AHCC,

PATRICK PETERSON, Medical Provider

– P.A., and DON MCINTYRE, Health

Service Manager,

Defendants.

NO. 4:18-cv-00302-SAB

**ORDER RE: CROSS MOTIONS
FOR SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion of Summary Judgment, ECF No. 30, and Defendants' Motion for Summary Judgment, ECF No. 31. The motions were considered without oral arguments. Plaintiff is proceeding *pro se* and Defendants are represented by Michelle Hansen from the Washington State Attorney General's Office. Plaintiff alleges that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by denying him access to medical care for chronic back pain. Having considered the motions, the responses and replies, and the relevant case law, the Court **denies** Plaintiff's Motion for Summary Judgment and **grants** Defendant's Motion for Summary Judgment.

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ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT * 1

Material Facts Not in Dispute

Plaintiff is currently incarcerated at Airway Heights Correctional Center (AHCC). During his time at AHCC, Plaintiff has been seen repeatedly by prison medical officials for chronic low back pain related to an injury he suffered as a teenager prior to his incarceration. ECF No. 9 at 7; ECF No. 39 at ¶ 8. On October 15, 2017, Plaintiff alleges that he woke up with extreme back pain and signed up for an urgent care appointment for October 19th. ECF No. 9 at 5. Defendant Peterson—a physician’s assistant with the AHCC urgent care clinic—was on call on October 19, 2017; he walked Plaintiff from the waiting room back to the examination room, observing Plaintiff’s gait to assess for any problems. ECF No. 9 at 5; ECF No. 39 at ¶ 8. In addition, Defendant Peterson reviewed his medical records from previous encounters with Plaintiff. ECF No. 39 at ¶ 8. Defendant Peterson concluded that Plaintiff’s condition was not so severe that he required an urgent care visit, as Plaintiff’s pain was considered a chronic condition. *Id.* Defendant Peterson then told Plaintiff that he could not circumvent his primary care physician by making an urgent care appointment and instructed him to schedule an appointment with his primary care provider to follow up on his chronic pain. *Id.* Defendant Peterson then escorted Mr. Metcalf back to the waiting room and ended the appointment. *Id.* Later this same day, Plaintiff was examined by Tracy Porter, RN, who noted that Plaintiff reported chronic low back pain, but was not in a state of medical emergency. ECF No. 31 at 4. On October 21, Plaintiff was also seen by Chenelle Patrick, RN, who also noted that Plaintiff reported chronic low back pain but was not in a state of medical emergency. ECF No. 38.

Shortly after his appointment with Defendant Peterson, Plaintiff sent a kite declaring a medical emergency; Defendant Peterson cancelled the kite on grounds that Plaintiff had already been seen that day. ECF No. 39 at ¶ 9. Plaintiff also filed an emergency medical grievance complaint, wherein he asserted that he wanted “medical to do their job.” ECF No. 9 at 5; ECF No. 39 at ¶ 10. AHCC Custody

1 Unit Supervisor Paul Duenich reviewed the complaint and, after consultation with
2 Defendant Peterson, determined that it did not meet the criteria for an emergent
3 medical complaint and directed the complaint to proceed through normal channels.
4 ECF No. 34 at ¶ 3; ECF No. 46 at ¶ 2. Defendant McIntyre—Health Services
5 Manager 2 at AHCC—reviewed the denial of Plaintiff’s initial grievance and
6 concluded that the grievance was baseless. ECF No. 35. Defendants Key—
7 Superintendent of AHCC—reviewed the emergency grievance and appeals of the
8 initial grievance and concluded that the complaint was not emergent in nature. ECF
9 No. 34. Following these grievances, Plaintiff did not seek medical attention again
10 until November 27, 2017, when he saw his primary care provider Ruth Oman, RN.
11 ECF No. 46 at ¶ 3.

12 **Summary Judgment Standard**

13 Summary judgment is appropriate “if the movant shows that there is no
14 genuine dispute as to any material fact and the movant is entitled to judgment as a
15 matter of law.” Fed. R. Civ. P. 56(a). The moving party has the initial burden of
16 showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*,
17 477 U.S. 317, 325 (1986). An issue of material fact is genuine if there is sufficient
18 evidence of a reasonable jury to return a verdict for the non-moving party. *Thomas*
19 *v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). The non-moving party cannot rely
20 on conclusory allegations alone to create an issue of material fact. *Hansen v.*
21 *United States*, 7 F.3d 137, 138 (9th Cir. 1993). If the moving party meets its initial
22 burden, the non-moving party must then go beyond the pleadings and “set forth
23 specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty*
24 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). The parties must support assertions by
25 citing to particular parts of the record or show that the materials cited do not
26 establish the absence or presence of a genuine dispute of material fact. Fed. R. Civ.
27 P. 56(c). However, a court may neither weigh the evidence nor assess credibility;
28 instead, “the evidence of the non-movant is to be believed, and all justifiable

1 inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255; *see also*
2 *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015).

3 In addition to showing there are no questions of material fact, the moving
4 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
5 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
6 to judgment as a matter of law when the non-moving party fails to make a
7 sufficient showing on an essential element of a claim on which the non-moving
8 party has the burden of proof. *Celotex*, 477 U.S. at 323.

9 When considering a motion for summary judgment, a court may neither
10 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant
11 is to be believed, and all justifiable inferences are to be drawn in his favor.”
12 *Anderson*, 477 U.S. at 255. When parties file simultaneous cross-motions for
13 summary judgment, the court reviews each motion and the appropriate evidentiary
14 material identified in support of the motion separately, giving the nonmoving party
15 for each motion the benefit of all reasonable inferences. *Brunozzi v. Cable*
16 *Commc’ns, Inc.*, 851 F.3d 990, 995 (9th Cir. 2017).

17 **Eighth Amendment Standard**

18 The Eighth Amendment guarantees that an incarcerated person be free from
19 cruel and unusual punishment during their term of confinement. This protection
20 extends to guarantee prisoners’ right to adequate medical treatment while
21 incarcerated. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). This right is violated
22 when a prison official acts with deliberate indifference to the serious medical needs
23 of a prisoner. *Id.* A prisoner has a serious medical need if he has “an injury that a
24 reasonable doctor or patient would find important and worthy of comment or
25 treatment; the presence of a medical condition that significantly affects an
26 individual’s daily activities; or the existence of chronic and substantial pain.”
27 *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other*
28 *grounds by WMX Tech., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997).

1 In order to state an Eighth Amendment claim under 42 U.S.C. § 1983, a
2 prisoner must satisfy a two-part test. *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th
3 Cir. 2004). First, the prisoner must demonstrate that the prison official objectively
4 deprived him of the “minimal civilized measure of life necessities.” *Id.* This
5 element is satisfied if the prisoner shows the risk posed by the deprivation is
6 obvious. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). Second, the
7 prisoner must show that the prison official acted with deliberate indifference in
8 depriving the prisoner of medical attention. *Id.* A prison official acts with
9 deliberate indifference if the official knows of and disregards an excessive risk to
10 inmate health and safety. *Id.* A defendant must purposefully ignore or fail to
11 respond to a prisoner’s pain or possible medical need in order to establish
12 deliberate indifference. *McGuckin*, 974 F.2d at 1060. In addition, the inmate must
13 show that the prison official had no reasonable justification for their actions in light
14 of the risk posed to the inmate. *Thomas*, 611 F.3d at 1150; *Jett v. Penner*, 439 F.3d
15 1091, 1096 (9th Cir. 2006) (finding deliberate indifference where a prison doctor
16 failed to ensure that plaintiff prisoner received necessary orthopedic care for a
17 broken thumb, causing the fracture to not heal properly).

18 Regardless of the basis for an Eighth Amendment claim, “vague and
19 conclusory allegations of official participation in civil rights violations are not
20 sufficient to withstand” a motion for summary judgment for failure to state a
21 cognizable claim. *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th
22 Cir. 1982); *see, e.g., Evans v. Skolnik*, 673 F. App’x 285, 288 (9th Cir. 2015)
23 (*citing Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003)) (“an allegation that a
24 prison official inappropriately denied or failed to adequately respond to a
25 grievance, without more, does not state a claim under § 1983.”).

26 **Qualified Immunity Standard**

27 Qualified immunity protects government officials sued in their individual
28 capacities from liability in § 1983 suits. *Plumhoff v. Richard*, 572 U.S. 765, 778

1 (2014). Prison officials involved in the day-to-day operations of a prison are
2 entitled to especially generous consideration in the determination of whether
3 qualified immunity applies. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (citing
4 *Bell v. Wolfish*, 441 U.S. 520, 531 (1979)). In order to defeat a claim of qualified
5 immunity raised by a prison official, a prisoner must show that a constitutional
6 right would have been violated on the facts alleged. *Plumhoff*, 572 U.S. at 774
7 (citing *Saucier v. Katz*, 533 U.S. 194, 200 (2001), reversed in part by *Pearson v.*
8 *Callahan*, 555 U.S. 223 (2009)). Second, the court must determine whether the
9 right at issue was clearly established at the time of alleged violation. *Id.*; see also
10 *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). An official has not
11 violated a clearly established right unless the right was sufficiently definite that
12 any reasonable official in the official's shoes would have understood that he was
13 violating that right. *Plumhoff*, 572 U.S. at 778-79. Although there does not need to
14 be a case directly on point to meet this standard, precedent must have placed the
15 question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). That being
16 said, the inquiry "must be undertaken in light of the specific context of the case,
17 not as a broad general proposition." *Mullenix v. Luna*, --- U.S. ----, 136 S. Ct. 305,
18 308 (2015) (internal citations and quotation marks omitted).

19 Discussion

20 For the reasons discussed below, the Court denies Plaintiff's Motion for
21 Summary Judgment, ECF No. 30, and grants Defendants' Motion for Summary
22 Judgment, ECF No. 31. Plaintiff's motion fails because he fails to demonstrate that
23 he is entitled to judgment as a matter of law on his Eighth Amendment claims.
24 Defendant's motion succeeds because they showed there was no genuine dispute as
25 to material fact and are entitled to judgment as a matter of law because Plaintiff
26 failed to state a claim under the Eighth Amendment. Defendants' motion also
27 succeeds because all three Defendants are entitled to qualified immunity.

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1 1. Plaintiff's Motion for Summary Judgment

2 In his motion, Plaintiff generally alleges that Defendant Peterson violated his
3 Eighth Amendment right to medical care when Peterson did not conduct a physical
4 examination of him during his visit of AHCC's urgent care clinic on October 19,
5 2017. ECF No. 9 at 5-7. Plaintiff also alleges that his rights were further violated
6 when Defendant Peterson cancelled a medical emergency kite filed by Plaintiff on
7 the grounds that he had already been seen that day and was not having a medical
8 emergency. *Id.* Finally, Plaintiff alleges that his rights were violated by Defendants
9 Key and McIntyre when they failed to investigate and overturn the denial of his
10 emergency grievances and appeals. *Id.*

11 In response to Plaintiff's motion, Defendants present significant evidence in
12 the form of affidavits that Plaintiff did in fact receive medical care for his back
13 pain between October 19 and 21, 2017. *See* ECF Nos. 34, 35, 36, 37, 38, 39, 40,
14 41, and 42. Indeed, based on this evidence, Plaintiff was seen by different medical
15 professionals during this time, all of whom noted in their visit summaries that
16 Plaintiff had a history of chronic back pain and complained of back pain during
17 these visits, but was not in a state of medical emergency. ECF Nos. 38, 39.
18 Plaintiff does not contest these facts; rather, Plaintiff focuses on the fact that he
19 was not given a physical examination by Defendant Peterson at the initial urgent
20 care appointment on October 19 and that he was not given an emergency medical
21 appointment after he complained about his first appointment.

22 Plaintiff's complaint seems to be that he was not given a physical
23 examination by Defendant Peterson, and that this failure to be physically examined
24 is what constitutes denial of access to medical care. ECF No. 47 at 4, 6. In
25 addition, with regards to Defendant Peterson's assertion that he examined
26 Plaintiff's gait in the walk to his office, Plaintiff disputes the length of the walk
27 and whether Defendant Peterson could have assessed his gait as "normal" given
28 previous injuries that he says give him a limp. Furthermore, Defendant disputes

1 that the condition for which he sought medical treatment on October 15, 19, and 21
2 was “chronic” in nature; however, in all of his interactions with AHCC medical
3 staff, Plaintiff’s medical records and notes describe his lower back pain as chronic.
4 ECF No. 47 at 4, 10. Although Plaintiff disputes some of the facts introduced by
5 Defendants, the facts are not material to the Court’s consideration of the merits of
6 this matter.

7 Having determined that there are no genuine disputes as to material fact, the
8 Court now turns to the question of whether Plaintiff is entitled to judgment as a
9 matter of law. As stated above, in order to succeed on an Eighth Amendment
10 claim, Plaintiff must demonstrate that he was (1) objectively deprived of “civilized
11 life’s necessities” and (2) that this deprivation was done with deliberate
12 indifference to a serious medical need. *Thomas*, 611 F.3d at 1150.

13 Although Plaintiff’s chronic back pain likely qualifies as a serious medical
14 need for purposes of the Eighth Amendment, *see McGuckin*, 974 F.2d at 1059-60,
15 Plaintiff fails to show that he was objectively deprived of a life necessity and that
16 Defendants deprived Plaintiff of those necessities with deliberate indifference.
17 Plaintiff asserts that he was wholly deprived of medical care and that his claims are
18 not based on a disagreement with Defendant Peterson about the chosen course of
19 treatment. *See* ECF No. 47 at 6. However, Plaintiff fails to rebut Defendants’
20 evidence and assertions that he was, in fact, provided medical care on October 19,
21 2017. Plaintiff introduces no evidence that the exams conducted by Defendant
22 Peterson were insufficient beyond baseless assertions that the exams were in fact
23 unacceptable. In addition, Plaintiff fails to dispute that he was given medical care
24 and a physical exam by Registered Nurse Porter on October 19 and by Registered
25 Nurse Patrick on October 21 or that he did not seek further medical care until his
26 appointment with his primary care provider Ruth Oman. ECF No. 46 at ¶ 3.

27 Based on the above, the Court concludes Plaintiff has failed to show that he
28 was objectively deprived of medical care and that Defendants deprived him of

1 medical care and were deliberately indifferent to his chronic back pain.
2 Accordingly, Plaintiff is not entitled to summary judgment in his favor and his
3 Motion, ECF No. 30, is denied.

4 2. Defendant's Motion for Summary Judgment

5 Defendants argue that they are entitled to summary judgment in their favor
6 for two reasons. First, Defendants argue that they are entitled to summary
7 judgment because Plaintiff has failed to state a claim upon which relief can be
8 granted. Second, Defendants argue that they are entitled to qualified immunity and
9 cannot be held liable for any alleged harms suffered by Plaintiff.

10 Based on the motions and applicable case law, the Court concludes that
11 Defendants are entitled to summary judgment on both grounds. Defendants have
12 demonstrated that there is no genuine dispute as to material fact and that they are
13 entitled to judgment as a matter of law on either of the theories they present in their
14 motions. Accordingly, the Court grants Defendants' Motion for Summary
15 Judgment, ECF No. 31.

16 Defendants are entitled to judgment as a matter of law because Plaintiff has
17 failed to state an Eighth Amendment claim upon which relief can be granted. As to
18 Defendant Peterson, summary judgment is warranted because Plaintiff has failed to
19 state a claim that Defendant Peterson denied him access to medical care. It is not
20 disputed that Plaintiff had an urgent care appointment with Defendant Peterson on
21 October 19, 2017. The fact that Plaintiff was unsatisfied with the way Defendant
22 Peterson conducted the appointment and his chosen course of treatment is not—
23 without more—evidence that Defendant Peterson violated Plaintiff's Eighth
24 Amendment right to medical care. Plaintiff is not entitled to “jump the line” to see
25 a medical provider because of a health problem that did not amount to a medical
26 emergency. *See, e.g., Peralta v. Dillard*, 744 F.3d 1076, 1082 (9th Cir. 2014)
27 (holding that prison officials may be skeptical of prisoner complaints, as prisoners
28 may exaggerate their symptoms in order to accelerate access to care). Absent

1 evidence that the manner in which Defendant Peterson conducted the urgent care
2 appointment with Plaintiff was objectively unreasonable, Plaintiff fails to state a
3 cognizable claim under the Eighth Amendment.

4 Furthermore, Defendant Peterson is entitled to qualified immunity and is
5 therefore not liable to Plaintiff. Plaintiff has failed to show that he had a
6 constitutional right to have a medical appointment conducted in a certain way or
7 that the way his appointment was conducted amounts to a constitutional violation.
8 Plaintiff has also failed to show that a reasonable prison official in Defendant
9 Peterson's shoes would have known that it would be unconstitutional to conduct a
10 medical appointment in that way. Plaintiff cites only to caselaw that generally
11 establishes the right to medical care in prison but does not and cannot point to
12 caselaw square on this point. *See Mullenix*, 136 S. Ct. at 308. Accordingly,
13 Defendant Peterson is entitled to qualified immunity.

14 As to Plaintiff's claims against Defendants McIntyre and Key, Defendants
15 are entitled to summary judgment because these Defendants are entitled to
16 qualified immunity. Plaintiff alleges only that Defendants McIntyre and Key
17 violated his constitutional rights in the way they handled his emergency
18 grievances. A prison officials' denial of a grievance does not in itself violate the
19 Constitution. *Ramirez*, 334 F.3d at 860. Defendants' decision to deny Plaintiff's
20 grievance and to route it through routine—rather than emergency—review is not a
21 constitutional violation. Accordingly, Defendants are entitled to qualified
22 immunity and summary judgment is granted in their favor.

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Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, ECF No. 30, is **DENIED**.

2. Defendants' Motion for Summary Judgment, ECF No. 31, is **GRANTED**.

3. The District Court Executive is directed to enter judgment in favor of Defendants and against Plaintiff.

IT IS SO ORDERED. The District Court clerk is hereby directed to enter this Order, to provide copies to counsel and to Plaintiff, and to **close** the file.

DATED this 9th day of December 2019.



A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

Stanley A. Bastian
United States District Judge